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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1039

PETITION NOT PRINTED

M. ELIZABETH GAIR,

Petitioner,

—against—

ROBERT L. GILL and EDWARD G. SWEENEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AND/OR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents respectfully pray that the petition for a writ of certiorari to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, entered November 14, 1968, in the proceeding entitled "In the Matter of the Application of Robert L. Gill and Edward G. Sweeney, Petitioners-Respondents, for the Appointment of a Committee of the Person and Property of M. Elizabeth Gair, an alleged Incompetent person, Respondent-Appellant," and the order of the Court of Appeals of the State of New York, entered January 16, 1969 in the same proceeding, be denied.

Opinions and Orders Below

1. Order entered July 31, 1967 in the Supreme Court, New York County, at Special Term, Part I, confirming the findings of the jury as to incompetency and appointing Robert L. Gill and Irving Kirschenbaum as Committee of the Person and Property of M. Elizabeth Gair (Appendix To Petitioner's Petition, pp. 38-45) and underlying opinion of said court dated July 7, 1967 (Appendix A To Respondents' brief herein).

2. Order entered April 25, 1968 in the Appellate Division, First Department, of the Supreme Court of the State of New York unanimously granting the motion made on April 10, 1968 for an order dismissing the appeal taken on behalf of the incompetent from the order confirming findings of the jury as to incompetency and appointing the Committee, unless the said appeal were perfected for the September, 1968 Term of the said court (Appendix B To Respondents' brief herein).

3. Order entered July 18, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, denying the motion made on behalf of the incompetent for an order extending her time to perfect the appeal from the September to the November 1968 Term of said court (Appendix C To Respondents' brief herein).

4. Order entered August 23, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, dismissing the appeal from the order of incompetency entered July 31, 1967 (Appendix D To Respondents' brief herein).

5. Order entered September 19, 1968 in the Appellate Division, First Department of the Supreme Court of the

State of New York, denying the application made on behalf of the incompetent for an order vacating the order of dismissal of her appeal (Appendix E To Respondents' brief herein).

6. Order entered September 19, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, dismissing the application made on behalf of the incompetent for an order extending her time to perfect the appeal (Appendix F To Respondents' brief herein).

7. Order entered September 19, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, dismissing the application of Leon Leighton, Guardian-ad-Litem, to have the appeal heard on the original record (Appendix G To Respondents' brief herein).

8. Order entered November 14, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, denying the application made on behalf of the incompetent for leave to appeal to the Court of Appeals of the State of New York from the three orders entered September 19, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York (Appendix to Petitioner's Petition, pp. 36-37).

9. Order entered January 16, 1969 in the Court of Appeals of the State of New York dismissing the motion made on behalf of the incompetent for leave to appeal to said Court from the order entered November 14, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York (Appendix to Petitioner's Petition, p. 35).

Jurisdiction

A writ of certiorari is requested by petitioner to review the order entered November 14, 1968 in the Appellate Division, First Department, of the Supreme Court of the State of New York, denying the application made on behalf of the incompetent for leave to appeal to the Court of Appeals of the State of New York from the three orders entered September 19, 1968 in the Appellate Division, First Department, of the Supreme Court of the State of New York, (a) denying the application made on behalf of the incompetent for an order vacating the order of dismissal of her appeal, (b) dismissing as academic the application made on behalf of the incompetent for an order extending her time to perfect the appeal and (c) dismissing as academic the application of Leon Leighton, Guardian-ad-litem, to have the appeal heard on the original record; and to review the order entered in the Court of Appeals in the State of New York on January 16, 1969 dismissing the motion made on behalf of the incompetent for leave to appeal to said court from the order entered November 14, 1968 in the Appellate Division, First Department, of the Supreme Court of the State of New York.

Respondents submit that petitioner has failed to establish that the jurisdiction of the United States Supreme Court should be invoked under Title 28, Section 1257 of the United States Code since there has been no infringement of the petitioner's constitutional rights and the questions raised are frivolous and, therefore, inadequate to confer jurisdiction.

Question Presented

Whether the petitioner, who failed to perfect her appeal from a trial in which she had a full hearing, is denied due process or equal protection of the law because the appellate courts dismissed her appeal for lack of prosecution within the prescribed time limits?

Constitution, Statutes and Rules Involved

This petition involves the Fourteenth Amendment of the United States Constitution, 28 U.S.C. § 1257; Rule 19 of the Supreme Court of the United States; and Section 101 of the New York Mental Hygiene Law.

Statement of the Case

This incompetency proceeding, instituted by respondents on January 20, 1967, for the appointment of a Committee of the Person and Property of their maiden aunt, petitioner herein, who is sometimes referred to as the "incompetent," or "Miss Gair," then 89 years old, who, as a result of advanced cerebral arteriosclerosis, was unable to manage herself or her affairs. All the incompetent's heirs at law in view of their personal knowledge of Miss Gair's condition, filed their consents to the appointment of a Committee of her Person and Property.

The sole objectant was one Vito F. Lanza, an attorney, unrelated to the incompetent, who, prior to December, 1964, the month in which Miss Gair suffered certain strokes which ultimately led to her complete mental deterioration, had had but a casual attorney-client relationship with her. After the cerebral vascular accidents, Mr. Lanza usurped

command of the incompetent's affairs on every level, including sole and unsupervised control of her fortune which is in excess of $1,700,000.00, dissipating her funds for such unorthodox purposes as the purchase of a new Cadillac for himself and the making of substantial money gifts to himself (concededly in excess of $12,000 since the incompetent's illness) and also to his friends. Further, at the time of the institution of the proceedings, said Mr. Lanza was conducting a grossly inappropriate courtship of the aged incompetent, a spinster.

Mr. Lanza retained one Morris Cooperstein, Esq. to oppose the petition for the appointment of a Committee and said Mr. Cooperstein appeared as the incompetent's attorney. Such opposition was doomed to failure, however, in view of the overwhelming evidence abundantly establishing that Miss Gair was necessarily confined in a carefully structured environment, cared for by a nurse and a housekeeper and was unable to function independently in any area. After an eleven-day hearing, the jury unanimously adjudicated Miss Gair as incompetent to manage herself and her affairs. Miss Gair testified at the trial at length.

Respondents moved on April 27, 1967 to confirm the jury findings and Mr. Lanza thereupon retained Messrs. Goldstein, Judd & Gurfein, who were substituted for Morris Cooperstein, Esq. as the incompetent's attorney of record. They opposed the motion of respondents but again Mr. Lanza was frustrated in his attempt to retain control of the incompetent's fortune, and the order appealed from, adjudicating Miss Gair to be incompetent was duly entered in the office of the Clerk of the County of New York on the 31st day of July, 1967, Index No. 41756/1967.

The order adjudicating Miss Gair as incompetent also appointed Robert L. Gill, a nephew and only son of the

incompetent's sole surviving sister and next of kin, and a member of the New York Stock Exchange (one of the respondents) and Irving Kirschenbaum, Esq., a distinguished New York attorney theretofore unknown to the incompetent, Mr. Gill or any other member of the family, as Committee of the Person and Property of the incompetent. Said Committee duly filed its bond, qualified and has continued to act as such Committee. The incompetent's assets by court direction are lodged in custodian accounts at two banks selected by the court and no change in security portfolio is made without court order and such transactions are handled directly by the banks pursuant to court orders. The expenditures on behalf of the incompetent are audited annually by a court appointed officer, the Committee examined and report made thereon. This is in direct contrast to the unorthodox, uncontrolled and undisciplined handling of such assets by Mr. Lanza prior to the adjudication of incompetency. Contrary to the allegation contained in the petition (p. 27) that Miss Gair's assets were "safe-guarded" by banks which held the assets in custodial accounts, prior to the adjudication, such assets could be completely withdrawn at any time. Further, the substantial income therefrom was under the unsupervised control of Vito Lanza, the self-appointed major-domo, who disbursed the funds of the incompetent for the unorthodox purposes referred to above.

On or about the 30th day of August, 1967, an appeal was taken by Messrs. Goldstein, Judd & Gurfein from the said order of incompetency to the Appellate Division, First Department and notice of appeal was filed in the office of the Clerk of the County of New York on said date, Appendix, p. 46, to Petitioner's Petition herein, the last day before the time within which an appeal could be taken expired. Nothing further was done regarding the appeal until April, 1968.

Since the appeal had not been perfected by April, 1968, Leon Leighton, Esq., Guardian-ad-Litem, with the full support of respondents and the Committee of the Person and Property of M. Elizabeth Gair, moved the Appellate Division on April 10, 1968 for an order dismissing the appeal unless perfected in the June, 1968 Term of that court. Despite vigorous opposition to such motion by Messrs. Goldstein, Judd & Gurfein, an order was entered by the Appellate Division on the 25th day of April, 1968 unanimously granting the motion to dismiss the appeal unless perfected for the September 1968 Term and further providing as follows:

> "Upon failure so to perfect the appeal, an order dismissing the appeal may be entered ex parte, provided a copy of this order is served upon the appellant within ten days after the date of entry hereof." (Appendix B, p. 4a)

A copy of said order, with notice of entry, was served on all parties on May 2, 1968, within ten days of the date of the order.

After the expiration of almost two months after entry of the above-mentioned order dated April 25, 1968, the petitioner's attorneys of record moved on June 25, 1968 for an order amending the Appellate Division's said order so as to extend the time within which to perfect the appeal from the September to the November, 1968 Term. By order dated and filed on July 18, 1968, said motion was denied with costs. Copy of said order with notice of entry was duly served on all parties on July 26, 1968.

Finally, for the third time, further application was made to enlarge the time within which to perfect this appeal. By order to show cause served by mail on July 30, 1968 and received by the attorney for respondents on July 31,

1968, Vito F. Lanza, the sole objectant in the incompetency proceedings as stated above, appearing for the first time in these entire procedings as the attorney for the petitioner, sought to extend the time within which to perfect this appeal to the *December* 1968 Term, despite the fact that the Appellate Division, by its order dated July 18, 1968, refused to extend the appeal even to the *November* Term as had been requested by the attorneys of record. Said order to show cause contained a proposed provision that "pending the determination of this application, the time of appellant to perfect the appeal is extended until further order of this Court." It is significant that the proposed stay was stricken by the Honorable Harold A. Stevens, after argument before him in chambers on August 1, 1968. The order to show cause, *with no stay*, was signed on August 1, 1968, returnable September 3, 1968. The respondents' attorney advised Miss Gair's lawyer on that date that she would proceed to enter an order dismissing the appeal for failure to prosecute if the appeal were not perfected for the September Term, which required the briefs to be served and filed some two weeks before the further application, already thrice denied, for an enlargement of time, would be heard. The summary statement dated August 1, 1968 filed by the Clerk of the Appellate Division recorded that statement by respondents' attorney, which was subsequently confirmed by letter to Mr. Lanza.

Despite such ample warning and with cavalier disregard of the orders of the Appellate Division denying the requests for enlargement of time within which to perfect the appeal and ignoring the significant and ominous fact that the stay had been stricken from the pending application for a reconsideration of the former orders of the court, the appeal was not perfected for the September, 1968 Term. After affording a margin of some ten days after the date

on which the briefs and all other papers were required to be served and filed in order to perfect the appeal as ordered by the Court, an application was duly made for an order dismissing the appeal and on August 23, 1968, one week thereafter, such order was entered and copy thereof with Notice of Entry duly served on August 26, 1968 on all parties.

On September 3, 1968 the Appellate Division again considered the contentions urged on behalf of the petitioner for further time within which to perfect the appeal and on September 19, 1968 three orders were entered, (1) denying the application to vacate the *ex parte* order of dismissal, (2) dismissing the application to extend the time to perfect the appeal as academic and (3) dismissing the application to have the appeal heard on the original record, as academic, copies of which were duly served on all parties by respondents' attorney.

Still desperate to regain control of the incompetent and her fortune, Mr. Lanza moved in the Appellate Division for reconsideration of the foregoing orders, or, in the alternative, for leave to appeal to the Court of Appeals from such orders, which application was denied by the November 14, 1968 order of the Appellate Division.

Thereafter, an application was made on behalf of the incompetent for leave to appeal to the Court of Appeals of the State of New York, from the three Orders entered on September 19, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, referred to above. The Court of Appeals dismissed the said motion upon the ground that the order sought to be appealed from did not finally determine the action within the meaning of the constitution. The order of dismissal was entered on January 16, 1969.

In that posture, petitioner now seeks a Writ of Certiorari requesting a review of the Order entered on November 14, 1968 in the Appellate Division, First Department of the Supreme Court of the State of New York, which denied petitioner's application for leave to appeal to the Court of Appeals from the three Orders entered in the Appellate Division on September 19, 1968, and a review of the order entered January 16, 1969, in the Court of Appeals of the State of New York, dismissing petitioner's application in that court for leave to appeal from the September 19, 1968 orders of the Appellate Division.

Reasons for Denying the Writ

It is respectfully submitted that the petitioner has failed to establish that jurisdiction of the United States Supreme Court should be invoked under Title 28, Section 1257 of the United States Code to review the Orders herein challenged since no constitutional rights have been abridged and the Petitioner's contentions are frivolous and inadequate to confer jurisdiction on this Court.

The petitioner is unable even to present the petition in proper form. The petition alleges violations of the New York State Constitution which are obviously questions that only the highest court of New York, the Court of Appeals, not this Court, may speak to. Further the petition claims that this Court should consider granting a writ of certiorari in this case because Rule 19(b) of the Supreme Court Rules lists as a consideration governing review whether the decision below so far departed from accepted judicial procedure as to call for an exercise of this Court's supervisory power. This consideration is not directed at decisions of state courts. It applies to decisions of the Federal Courts of Appeal over which this Court has a power of

supervision. Thus the petitioner has simply based his request for a writ on non-applicable grounds.

After distilling the petition down, the only claim cognizable by this Court is that arising under the due process clause of the fourteenth amendment for failure of the New York courts to hear petitioner's appeal on the merits. Because of petitioner's blatant procedural defaults, such constitutional claim is without the slightest merit.

Petitioner's argument for allowance of the Writ as outlined in the petition, page 9-A, will now be disposed of *seriatim.*

POINT I

The orders below dismissing petitioner's appeal and dismissing her application for reargument thereof in the Appellate Division and dismissing her application in the Appellate Division and the Court of Appeals for leave to appeal to the Court of Appeals do not amount to a denial of Petitioner's rights to due process and the equal protection of the law.

The petition, under the heading "Procedural Facts", pp. 10-14, traces the chronology of steps taken and orders entered in connection with petitioner's appeal from the order entered on July 31, 1967 in the Supreme Court of the State of New York, confirming findings of incompetency and appointing a committee of the person and property of Miss Gair.

It is petitioner's contention that she has been deprived of her constitutional right to have her appeal heard on the merits on the ground that Appellate Division acted unfairly and unconstitutionally and so departed from the accepted and usual course of judicial proceeding as to

constitute a violation of her rights under the Federal Constitution and under the New York State Constitution to due process and the equal protection of the law.

There is no merit whatsoever to such contention. The courts below did not depart from the usual course of judicial proceedings but on the contrary followed their usual course in order to enforce diligent prosecution of an appeal. It is abundantly clear from an examination of the chronology which appears in respondent's statement of facts hereinabove that nothing whatsoever was done on petitioner's behalf to perfect the appeal from the order entered in July, 1967 except to have the record certified and to file some form of "draft brief", which was not served on the other parties, and a required statement with the Clerk of the Appellate Division on August 7, 1968. All items in the chronology from the filing of the Notice of Appeal to the entry of the order dismissing the appeal for failure to prosecute the same on August 23, 1968, over a year later, relate to successive applications for an enlargement of time.

Certainly, there is nothing fundamentally unfair, arbitrary, capricious nor any unconstitutional denial under the Federal or New York State Constitutions of the incompetent's right to due process and equal protection of the law arising out of the fact that the Appellate Division on August 23, 1968 entered the order dismissing the appeal, pursuant to the provisions of its order entered on April 25, 1968.

After 15 months of enormously costly and utterly unnecessary litigation (almost a travesty on justice in view of the incompetent's obvious condition), involving contested proceedings not only in the Supreme Court but in the Appellate Division, applications for enormous fees

made by various attorneys retained on behalf of the incompetent to secure payment from her estate, contrary to the provisions of Section 101(9)(b) of the Mental Hygiene Law and appeals from various orders denying such inroads to be made into the incompetent's funds, a motion was made as set forth above in April, 1968, for an order dismissing the appeal from the July 31, 1967 order of incompetency for failure to have perfected it, despite numerous representations prior thereto by the incompetent's attorneys of record that they would give the matter their attention.

The Appellate Division, by its order dated April 25, 1968, despite the fact that over eight months had passed since the entry of the order appealed from, gave the appellant an additional *four* months within which to perfect the appeal, providing in said order that if not perfected by the September, 1968 Term, an *ex parte* application for an order of dismissal would be granted.

Thereafter, however, in lieu of perfecting the appeal, all energies of a new attorney selected by Mr. Lanza to act for petitioner, were devoted to numerous application for relief from the provisions of that order. The time expended in such applications undoubtedly exceeded the time required for an appeal brief, the minutes having been obtained early in 1967 and the grounds upon which the appeal was based having been thoroughly briefed in connection with the cross-motion made by Miss Gair's counsel in applications for fees and the expense of an appeal from the basic order. Indeed, the petition states that a draft of the brief had been prepared and all other steps had been taken to perfect the appeal by September 3, 1968, the return date of a motion for further time. Significantly, however, application was made on that day to have the ap-

peal heard in the December 1968 Term. Why did counsel seek to have the appeal heard *four months later*, particularly when everything was done, except for the printing or typing of the brief? Is not this persuasive evidence that the object of the entire exercise had been to postpone the final and ultimate conclusion of the proceeding?

Those who would appeal on behalf of the incompetent had the right to do so for more than a year but despite timely warnings, the limitation fixed by the Appellate Division had been totally disregarded. Accordingly, there has been no unconstitutional denial of the incompetent's rights, either under the United States Constitution or the New York Constitution, and this Court should not grant a writ of certiorari to review these frivolous claims ostensibly arising under the United States Constitution.

POINT II

The trial of the issues in the incompetency proceeding before a commissioner and a jury selected from the sheriff's panel did not violate the incompetent's constitutional right to due process and equal protection of the laws.

The petitioner attempts to raise other constitutional issues in her petition that would, even if meritorious, be foreclosed by a determination on Point I that her right to due process was not violated when her appeals were not heard on the merits because of failure to prosecute. If there is no constitutional violation there, then all other claims arising from the incompetency trial have been, in essence, waived by petitioner's failure to raise them in the time prescribed for an appeal. She cannot now come into this Court and ask for a review of issues that arose from

a trial, when such review was foreclosed below because of her procedural defaults. However, despite the apparent waiver, the respondent will demonstrate factually that petitioner's other claims are equally frivolous.

Petitioner argues that her constitutional right to due process and equal protection of the laws was violated because the issue of incompetency was tried (a) before a commissioner instead of a justice of the New York State Supreme Court and (b) before a jury selected from the Sheriff's panel instead of before a petit jury. Clearly, there is no merit to such contentions.

First, with respect to the trial of the issue of incompetency before a commissioner, such a trial has long been authorized by statute. The New York State Mental Hygiene Law, § 101(5) provides specifically for the trial of the issue of incompetency by either a court and a petit jury or by a commissioner and a sheriff's jury. The constitutionality of such statute has not been successfully challenged and, therefore, there is no merit in petitioner's position that the statute is void as to Miss Gair.

Petitioner's objection to a trial before a commissioner is predicated specifically on the ground that the statute does not provide "guidelines" for determining which proceedings may be tried before a commissioner or indeed for determining the legal qualifications of the commissioner. Petitioner observes that as the statute reads, "a commissioner may be an alien, an adjudicated incompetent or a convicted felon".

Implementing the statute, however, is case law which has since earliest times set forth the requirement that commissioners must be competent to execute the commission. A case in point is *Matter of Root,* 8 Paige 625 (1841) in which Chancellor Walworth held as follows:

> "Where a commission of lunacy is issued, it is the duty of the solicitor for the petitioner to name commissioners who will be competent to execute the commission, and to give the proper instructions to the jury, without the aid of counsel to perform that duty for them. For this purpose a solicitor or counsellor of this court should always be named one of the commissioners; and in cases of importance the commission ought not to be executed without his presence."

It is significant in this connection to observe that there can be no question concerning the qualifications of Commissioner Lawrence V. Brock who presided at the trial of the issue of incompetency. His professional ability and his standing at the bar are well recognized. During the early years of his career, he served as Mr. Justice Dore's law secretary in the Appellate Division, First Department, and has subsequently served with distinction in many high offices.

Therefore, there is no merit in petitioner's contention that she was denied her right to due process and equal protection of the law because the issue of incompetency was tried before a commissioner instead of a judge.

Further, petitioner argues, and equally unimpressively, that her right to due process and equal protection of the law was violated because the incompetency trial was held before a jury selected from the sheriff's panel.

There is obviously no authority in support of such a contention and this argument has been fully answered by this Court in *Fay* v. *New York,* 332 U.S. 261, 267-77, *rehearing denied,* 332 U.S. 784, and also by the Court of Appeals of the State of New York in *People* v. *Dunn,* 157 N.Y. 528.

Further, in *People* v. *Jackson,* 20 N.Y.2d 440 a first degree murder conviction by a so-called "blue ribbon" jury had been challenged and in upholding the conviction, the highest court in the State of New York repeated the enunciations in *Fay* v. *New York, supra,* relating to the constitutionality of such jury. To the same affect also were the following cases: *People* v. *Torris,* 17 N.Y.2d 820; *People* v. *Maggiore,* 16 N.Y.2d 1009 and *People* v. *Bloeth,* 16 N.Y. 2d 505.

The authorities relied upon by petitioner in support of her argument concerning the jury are inapposite because they reflect invidious discrimination in the selection of jurors. The sheriff's jury, on the other hand, involves a random selection process that is used in New York to select petit juries. There is nothing inherently discriminatory about the selection process. In *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, a verdict for the defendant was reversed in a personal injury action on the ground that there had been "deliberately and intentionally excluded from the jury lists all persons who worked for a daily wage", 328 U.S. at 221. Such explicit discrimination is simply not reflected in the selection of the jury from the sheriff's panel.

Smith v. *Texas,* 311 U.S. 128, involved the reversal of a conviction of a Negro on the ground that the grand and petit juries had been selected in a manner which discriminated against Negroes. Racial discrimintion in the selection of jurors is a far cry from what the petitioner alleges here.

Witherspoon v. *Illinois,* 20 L.Ed.2d 776, involved the reversal of a conviction for murder in the first degree on the ground that persons who do not believe in capital punishment had been excluded from the jury. It is difficult, if not impossible, to accept petitioner's rationale which would permit her to draw any comfort from this

decision, in her condemnation of a jury selected from the sheriff's panel.

Petitioner also urges as an argument against the constitutionality of sheriff's panel the fact that its members are exempt from jury service. However, members of the sheriff's panel are not exempt from service; they are merely members of another panel, who "are petit jurors in that they decide questions of fact only." *Livoti* v. *Fitzgerald*, 255 App. Div. 720.

Petitioner refers to certain comments made by the Judicial Council concerning sheriff's juries. Nonetheless, the Legislature choose to disregard such recommendation and, thereafter, enacted Judiciary Law, Section 608, which provides as follows:

> "The county clerk of each county in a city having a population of one million or more shall select annually from the persons qualified to act as trial jurors, the names of such number of persons as he deems necessary to constitute the sheriff's jurors for that year.
>
> "The county clerk shall draw and summon panels of sheriff's jurors, upon request of the sheriff."

Therefore, the sheriff's panel is a properly constituted body since the Legislature, not the Judicial Council, makes the laws.

Further, there was in effect a waiver on behalf of the incompetent to the objection to a jury selected from the sheriff's panel, as appears from the Transcript of the hearing on May 31, 1967 for an order confirming the jury findings, pp. 114-116:

> "Mrs. Gentleman: Furthermore, when the jury was impaneled by the Sheriff, there was a statement made

by Mr. Cooperstein, before the jury was impaneled, before we questioned the jury, that there was, as he put it, some question in his mind as to whether this was the proper manner for this kind of jury to sit, and therefore, he wanted to make an objection.

"However, it is my contention that that objection was waived because on page 26 and again on page 28 of the transcript of the hearing, Mr. Cooperstein had an opportunity to examine the jury and he did—very briefly, he stated as follows:

'"(Reading) "Mr. Cooperstein: Ladies and gentlemen, Mrs. Gentleman has asked you precisely all the questions which are usually asked in cases of this kind. Has anybody in your family had any situation similar to the one we have now, where a person's competency is being questioned.

'"(No response.)

'"Mr. Cooperstein: I assume by your silence that the answer is no. I peremptorily excuse the four ladies.

'"(Discussion off the record.)

'"Mr. Cooperstein: This jury is satisfactory."

"The Court: That's the very question I asked you last time.

"Mrs. Gentleman: Yes, and I answered—

"Mr. Judd: As I told you, your Honor—

"Mrs. Gentleman: No one could recollect. I stated it was my recollection Mr. Cooperstein had stated it was satisfactory. On checking, I find that he said that. On page 28—the Commissioner stated to each one separately—

"(Reading) '"Commissioner Brock: Is the jury satisfactory?

'"Mr. Leighton: Yes.

'"Mr. Cooperstein: Yes.

'"Mrs. Gentleman: Yes."'

"Therefore, based on that, if your Honor please, it is a plain yes. The jury was satisfactory, without reservation.

"It is our position that there was in effect a waiver."

It is also significant that after the jury was initially selected, it consisted of ten ordinary jurors and eight selected from the sheriff's panel. Miss Gair's attorney excused four jurors who were ordinary *petit jurors* so that the final jury was composed of eight members selected from the sheriff's panel and six petit jurors. If Miss Gair's attorney preferred petit jurors, he could have had a jury composed of ten petit jurors with only four members of the sheriff's panel. He was the one who increased the number from the sheriff's panel by excusing petit jurors.

It is, therefore, respectfully submitted that there is no merit whatsoever to petitioner's contention that the trial of the incompetency issue before a commissioner and a jury selected from the sheriff's panel abridged her constitutional rights.

POINT III

Petitioner's objections to conversations between the guardian ad litem, his wife and certain jurors is unrelated to the issue before this Court.

The petitioner urges in support of her argument herein that a mistrial should have been directed because of certain conversations between the guardian ad litem, his wife and certain jurors. Here again this issue is not properly before this Court. First, it is not of constitutional dimensions and, second, even if it were it is foreclosed from consideration because Petitioner failed to perfect her appeal in a timely fashion so that the issue could be heard on the merits below. Nevertheless, the respondent will show that factually there is no basis for petitioner's contention.

Mr. Justice Levey in hearing the cross motion in opposition to the motion to confirm the finding of the jury conducted an examination of the guardian ad litem and his wife for the purpose of exploring fully into these conversations and affording all parties an opportunity to cross-examine. As is apparent from the transcript of these hearings on May 25, 1967 and May 31, 1967, none of the conversations related to the case but to inconsequential matters. Further, all the conversations were initiated by the jurors and the guardian ad litem testified that the jurors in so doing recognized that he had no interest in the outcome of the hearing, since he was not a party in interest in the outcome of the hearing.

The guardian ad litem's wife had a short conversation with one of the jurors relating to Mississippi, the juror having heard the Southern accent and started the conversation. Both the guardian ad litem and his wife testified

under oath to the substance of all conversations and it is impossible to believe that such exchange of words unrelated to the matter at hand would be prejudicial in any way.

It is significant that the Guardian was not in the same position as the attorneys for either party. The Guardian made it quite clear that he would be paid the same fee whether Miss Gair was found to be incompetent or competent. Therefore, even assuming that the few jurors who spoke with the Leightons were impressed by them, and were prepared to be derelict in the honest discharge of their duty in order to perform a favor for the Leightons, they knew that their finding would have no personal effect whatsoever on the Guardian.

This ground is also unimpressive in view of the fact that Miss Gair's attorney did not object to the guardian ad litem's conversations with the jurors until after the incompetent had testified, when it was clearly apparent that there would be a finding of incompetency. It is respectfully submitted that such delay in moving for a mistrial on the basis of the conversations until there was an overwhelming probability that the case had been lost is fatal to this contention, even assuming it were otherwise relevant.

Moreover, and of paramount importance in this connection, such contention is completely irrelevant to the petitioner's argument that her constitutional rights had been abridged. If petitioner had perfected her appeal within the time provided, she could have submitted for appellate review any offensive rulings. That she failed to avail herself of the opportunity for such judicial review does not bestow jurisdiction on this Court.

POINT IV

Petitioner's contention that the appointment of a committee herein and the finding of incompetency are contrary to the law and facts is unrelated to the issue before this Court.

It is respectfully submitted that the jurisdiction of this Court cannot be invoked on the ground that the order confirming the finding of incompetency and appointment of a committee was against the weight of evidence and not in accord with the law. Once again, if an appeal had been diligently prosecuted, an Appellate Court would have reviewed such finding. Since the appeal was not prosecuted after ample opportunity had been afforded the petitioner to perfect the same, she cannot now be heard to complain with respect to the findings of the jury and certainly she cannot contend with merit that her constitutional rights have been abridged because in her opinion the findings were against the weight of evidence.

Accordingly, petitioner's argument set forth on pages 24 to 33 of her petition is completely immaterial and irrelevant to the issue before this Court. Nonetheless, in order to refute for the record the gross misrepresentations contained in such portion of the petition, a statement of relevant facts follows, predicated on the transcript of testimony.

Prior to December, 1964, Miss Gair, a spinster of great inherited wealth, lived an entirely normal existence, managed her own affairs, paid her own bills, kept her own checkbook, and enjoyed a full social life, indeed, a remarkably active life for a person of her age (358, 359, 586, 1102).*

* The pagination is to Transcript of the Trial.

Dr. Aubrey L. Whittemore, the incompetent's physician of many years, testified that she suffered two strokes at the end of December, 1964, and was bedridden for approximately three months thereafter. Physically, she was found to be suffering from cerebral arteriosclerosis which affected the normal function of her brain (83) and from a point beginning with the onslaught of her illness in late December, 1964, a drastic change took place (375). She became totally unable to function independently on any level whatsoever and in need of constant attendance by a trained staff, including a nurse, who lived with her and had to be on 24-hour duty (378) to watch over and care for the incompetent (839). She became completely disoriented as to time and space, believing those who were dead to be still alive (380, 381, 593); and those who were adults still to be infants; she thought she still occupied the Brooklyn home from which she moved some 40 years ago and escaping from her staff in the night, wandered to other floors, including the lobby of her apartment, clad only in a nightgown (374-377); she was completely disoriented as to the neighborhood in which she had lived for over 20 years (209) and standing under the canopy of her apartment house did not know where she was; she did not know her residence address and indeed, when she took the stand, gave a completely erroneous address; she could not recall her telephone number or, indeed, use the telephone (385, 595); she became confused as to identities and relationships, believing her two nephews, respondents herein, to be married to her sisters, their respective mothers (382, 592); she confused Mr. Gill with Mr. Sweeney, and, indeed, at times did not show any signs of recognition of either; she was unable to carry on a coherent conversation (595) and unable to recall recent events; she had difficulty completing sentences and was forgetful of vocabulary (595); on occasions she has fallen into

trances, muttering incoherently (594) and suffers from various delusions and hallucinations (593).

With the incompetent's decline into senility, she lost all comprehension regarding her financial affairs (836-838). She no longer could read numerals, pay bills, or keep a checkbook, and, indeed, had no understanding whatsoever as to her assets or the manner in which they were handled following her illness (1206).

Respondents, her favorite nephews, to whom she had been devoted since their birth, the incompetent's loyal housekeeper of many years, the three nurses who had attended her during the preceding two years and four physicians, two of whom were selected by respondents and two by Mr. Lanza, all testified to various signs of Miss Gair's psychopathology, and the evidence abundantly established that she was totally unable to live a normal life, had to be cared for constantly and was completely incompetent to manage herself and her affairs.

The medical testimony was completely persuasive and left no room for doubt as to the necessity of judicial supervision to protect the incompetent and her property.

For example, Dr. Justin L. Greene, Chief Psychiatrist, Roosevelt Hospital, testified to the results of his neurological and psychiatric examination of the incompetent and summed up his testimony in support of the petition as follows:

> "A. I consider Miss Gair completely incompetent.
>
> Q. What is your diagnosis, Doctor, of Miss Gair's condition? A. She has a chronic brain syndrome due to cerebral arteriosclerosis. To explain a little further, it is hardening of the arteries of the brain which prevents sufficient blood flow in the brain to nourish it and

to allow the brain cells to work in a way that would be compatible with her being able to manage her own affairs.

Q. Dr. Greene, have you an opinion as to whether she is able to function normally, to handle herself as an individual? A. Absolutely not. She needs constant care. There must always be someone with her. That's that.

Q. Have you an opinion as to whether or not she would be competent to handle her own financial affairs? A. She would be completely incompetent to handle her own financial affairs" (208-219).

In view of Dr. Greene's testimony (198-248) setting forth the irrefutable evidence of petitioner's complete disorientation, the statements in the petition which would purport to establish that the finding of incompetency was contrary to the weight of the evidence must be disregarded.

Indeed, Dr. Edward M. Gould, the psychiatrist hired by Mr. Lanza to oppose the petition, admitted on cross-examination that Miss Gair was completely incompetent to take a walk in the neighborhood and find her way home (836-838); that it was a necessity for her to be cared for constantly, testifying as follows:

"Q. Under the ordinary standards is she competent to perform the usual functions of living without assistance? A. If you turn her loose, she certainly couldn't function" (847).

It is respectfully submitted that Miss Gair's own testimony, standing quite alone (1032-1061), abundantly supports the finding by the jury that she was unable to manage herself or her affairs. Her testimony was nonresponsive and rambling and disclosed her complete disorientation.

For example, she referred to her mother as having been "alive possibly" a week ago, whereas her mother has been dead for 40 years; she referred to her sister Lucy, the 80-year-old mother of petitioner Robert L. Gill, as "a child"; she stated that her sister, Florence was killed by a Mr. Lanza; she insisted that petitioners' attorney was a nurse and that the judge was a minister.

A portion of petitioner's testimony has been reproduced and is attached as Appendix H, to which reference is respectfully made.

Although completely irrelevant to the issue before this Court, it is worthy of note that the statement on page 33 of the petition to the effect that Miss Gair had been kept waiting for about three hours before she was permitted to testify is entirely contrary to the fact. However, whatever period of time she spent in the courthouse before testifying was not due to any act on the part of the respondents. As a matter of fact, the respondents had not been advised of Miss Gair's presence in the courthouse and quite inadvertently during the testimony of another witness, it was brought to their attention that Miss Gair was in an anteroom. Immediately upon learning this fact, the witness' testimony was interrupted and Miss Gair was forthwith called to the stand to testify (1022).

Further and compelling evidence of Miss Gair's incompetency can be found in her relationship with Vito Lanza, who prior to her illness had never been a guest in her home. However, as her mental condition deteriorated, Mr. Lanza obtained more and more control over her. Despite the fact that she was totally unable to comprehend the nature of a marriage relationship, Mr. Lanza was doing everything within his power to obtain complete control of Miss Gair

by marrying her (1385). For example, his Christmas card to her in 1966 carried the following telltale inscription:

"Dated December 25, 1966

Dear Elizabeth,

This could be, if you wished it to be, the merriest Christmas of them all.

Perpetually,

Vito" (1083).

When asked by the Guardian ad Litem if he planned to marry Miss Gair, Mr. Lanza did not deny such intention (1212), stating it was none of Mr. Leighton's business. The incompetent indeed spoke constantly of the wedding plans and when first she met the Guardian ad Litem she asked him to be best man (1205)!

Evidence was adduced also to the effect that Mr. Lanza was planning to take Miss Gair to Europe, she herself referring to this projected trip and a card sent to the incompetent by Mr. Lanza with one of his many bouquets of flowers in January, 1967, read as follows:

"To Elizabeth,

Just a little closer to our trip.

Eternally,

Vito" (1084).

During this bizarre courtship, following Miss Gair's illness, Mr. Lanza usurped control of her financial affairs. While she was still bedridden, he took possession of her checkbooks and arranged for all the financial mail to be given to him (389). He admitted on cross-examination that he endorsed her name to checks payable to her and deposited them to his own account, earmarking them on his

personal records for ultimate credit to her (1139). Although prior to the incompetent's illness, Mr. Lanza had not handled any of her finances, he usurped the function of paying all Miss Gair's household expenses and distributing her funds as he deemed appropriate. He adopted the procedure of paying her expenses with his own funds and periodically submitted statements to her, supporting his request for reimbursement. He conceded having thus received $80,946.78 in the two-year period of her illness.

Further, Mr. Lanza admitted on cross-examination that he had received some $12,000.00 as "gifts" (1111), and also arranged for his friends, Anna Ventura and Sue Beattie, known to the incompetent, to receive money gifts after he assumed control of the funds. Anna Ventura admitted on cross-examination that she received some $3,000.00 as gifts in the two years of Miss Gair's illness by two checks, each in the amount of $1,000.00, from the incompetent and one check in like amount from Mr. Lanza which he charged to Miss Gair, Miss Ventura further admitting that the maximum gift she had ever received before Miss Gair's illness was $25 (767-769).

The complete impropriety of such cavalier handling of the incompetent's funds was established by Dr. Gould, the psychiatrist hired by Mr. Lanza, who admitted on cross-examination that Miss Gair "is certainly not competent" to review a statement and comprehend its contents (836).

Miss Gair further disclosed in her testimony that she had no comprehension of the financial matters handled by Mr. Lanza. Indeed, she testified that she gave Mr. Lanza a $5,000.00 gift because he had spent so much money to pay her bills, her testimony in that regard being as follows:

> "Q. . . . How much money did you give Mr. Lanza to buy a car? A. I gave him nothing really because

> he had paid for everything for me. Mine was a simple little $5,000.00 just right out of where I kept it."

The necessity, therefore, of having Miss Gair's funds handled by a Committee was abundantly established.

Again, Miss Gair's testimony abundantly established that she did not understand the manner in which Mr. Lanza handled her funds for she was unable to answer any questions concerning large checks which she had signed for him. Indeed, she clearly indicated the complete lack of any supervisory control of her funds when she testified that if the check is to Mr. Lanza, "that's o.k." and when asked the purpose of various large checks payable to him, she murmured: "I don't know, I never asked him" (1055).

Accordingly, it is respectfully submitted that there is no merit whatsoever to the petitioner's contention that the finding of the jury on the issue of incompetency is contrary to the weight of evidence. Indeed, this was admitted by petitioner's prior attorney, Orrin G. Judd, Esq., at the hearing on the motion to confirm the jury's finding of incompetency, Mr. Judd having stated as follows in open Court:

> "The Court: In effect, what you are saying—in effect, you are saying that the verdict of the jury is against the weight of the evidence, right?
>
> "Mr. Judd: Not against the weight of the evidence."
>
> (Transcript of May 25, 1967 hearing, p. 61)

Finally, it is again urged that the petitioner's arguments with respect to alleged errors on the trial are completely irrevelant to a determination of the single issue before this Court. Conversations of the guardian ad litem with the jurors and an analysis of the evidence at the incompetency proceeding are totally unrelated to the constitutional

question to be determined herein. The jurisdiction of this Court cannot be invoked unless there has been an infringement of petitioner's constitutional rights. Clearly and beyond cavil, the question of whether or not there was any merit to the appeal which petitioner failed to perfect is not pertinent.

CONCLUSION

It is respectfully submitted that the petitioner's petition for a Writ of Certiorari to the Court of Appeals of the State of New York or to the Appellate Division, First Department, Supreme Court of the State of New York should be denied.

Respectfully submitted,

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